JOBNAME: No Job Name PAGE: 1 SESS: 1 OUTPUT: Mon Aug 15 12:40:12 2011
//caseml/case/mlj/2011_004_mlj_161

Zulpadli & Edham v Inai Offshore & Marine Engineering Sdn Bhd (in liquidation)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–2804 OF 2010
SULAIMAN DAUD, JEFFREY TAN AND ZAHARAH IBRAHIM JJCA
17 JANUARY 2011

Lien — Solicitors — Lien over 'property or money recovered or preserved' — Whether appellant had lien over monies recovered for respondent by negotiations — Whether lien enforceable by charging order under common law or statute — Respondent paid appellant RM1.4m for legal services rendered — Whether payment void for being made after presentation of winding-up petition — Whether monies paid should be returned — Companies Act 1965 s 223

Both the appellant firm of solicitors and the liquidators of the respondent appealed separately to the Court of Appeal against the decision of the High Court on an application by the liquidators for, inter alia, the return of RM1.4m which the respondent had paid to the appellant for legal services rendered. The basis for the application was that the payment was made after a winding up petition against the respondent was presented and therefore void under s 223 of the Companies Act 1965 ('the Act'). The High Court held that only RM757,642.08 of the RM1.4m offended s 223 and was returnable while the balance RM642,359.92, which was the appellant's legal fees in a matter in which the appellant had recovered RM12m for the respondent through negotiation, was in order. The RM12m was paid directly to the respondent by its debtor and was never in the appellant's possession. The court held the appellant had a particular lien over that sum but did not make any validation order under s 223.

Held, dismissing the appellant's appeal and allowing the respondent liquidator's appeal with costs of both appeals to the respondent:

(1) In the absence of a charging order or an order validating the payment under s 233 of the Act, the entire RM1.4m paid to the appellant was void and had to be returned to the respondent (see para 22).

(2) If at all the appellant held any lien, whether under common law or statute, it could only be enforced by a charging order. However, since the RM12m was recovered by negotiation and not under a judgment, a charging order was out of the question whether under common law or statute (see paras 14 & 20).

JOBNAME: No Job Name PAGE: 2 SESS: 1 OUTPUT: Mon Aug 15 12:40:12 2011
//caseml/case/mlj/2011_004_mlj_161

(3) In the case of property recovered by negotiation, there was no lien at common law (*Halsbury's Laws of England* 4th Ed, Vol 44(1), para 254). Hence no charging order at common law could be obtained (see paras 12, 15 & 18).

(4) For a charging order to be obtained under s 123 of the Legal Profession Act 1976, the court that could declare an advocate and solicitor entitled to a charge on the property recovered or preserved was the court in which that advocate and solicitor had been employed to prosecute or defend, and in which that property had been recovered or preserved. The court below was not that court. In fact, there was no such court as the property was not recovered under any judgment (see para 20).

(5) Even if it could be accepted that the property was recovered under legal proceedings, that is, on account of the appellant issuing a winding-up petition against the respondent's debtor, Malaysian Marine and Heavy Engineering Sdn Bhd (MMHE), yet it remained that the lien of the appellant could only be enforced by a charging order which was not obtained (see para 20).

(6) A validation order under s 233 of the Act was the only option. But there was no application from the appellant for such an order. Without a validation order the remittance of the RM1.4m to the respondent on 19 August 2009 was a disposition of the respondent's property after commencement of the winding-up against the respondent on 29 June 2009 and was therefore void (see para 21).

[Bahasa Malaysia summary

Kedua-dua firma peguamcara dan likuidator–likuidator responden merayu secara berasingan kepada Mahkamah Rayuan terhadap keputusan Mahkamah Tinggi atas permohonan oleh likuidator–likuidator, antara lain, untuk pemulangan RM1.4 juta yang responden telah bayar kepada perayu untuk perkhidmatan undang-undang yang diberikan. Asas permohonan tersebut adalah bahawa bayaran telah dibuat selepas suatu petisyen penggulungan terhadap responden dikemukakan dan oleh itu adalah batal di bawah s 223 Akta Syarikat 1965 ('Akta'). Mahkamah Tinggi memutuskan bahawa hanya RM757,642.08 daripada jumlah RM1.4 juta melanggar s 223 dan adalah boleh dipulangkan manakala baki RM642,359,92 yang merupakan fi guaman perayu di dalam perkara yang mana perayu telah mendapatkan semula RM12 juta untuk responden melalui rundingan, adalah betul. RM12 juta dibayar secara langsung kepada responden oleh penghutangnya dan tidak pernah di dalam milikan perayu. Mahkamah memutuskan bahawa perayu mempunyai lien tertentu atas jumlah tersebut tetapi tidak membuat apa-apa perintah pengesahan di bawah s 223.

Diputuskan, menolak rayuan perayu dan membenarkan rayuan likuidator–likuidator responden dengan kos kedua-dua rayuan kepada responden:

(1) Di dalam ketiadaan perintah gadaian atau perintah pengesahan bayaran

JOBNAME: No Job Name PAGE: 3 SESS: 1 OUTPUT: Mon Aug 15 12:40:12 2011
//caseml/case/mlj/2011_004_mlj_161

di bawah s 233 Akta, keseluruhan jumlah RM1.4 juta yang dibayar kepada perayu adalah batal dan perlu dikembalikan kepada responden. (lihat perenggan 22)

(2) Jika sememangnya perayu mempunyai apa-apa lien, sama ada di bawah common law atau statut, ia hanya boleh dikuatkuasakan oleh perintah caj. Walau bagaimanapun, oleh kerana RM12 juta telah dikembalikan melalui rundingan dan bukan di bawah penghakiman, perintah caj adalah di luar persoalan sama ada di bawah common law atau statut. (lihat perenggan 14 & 20)

(3) Di dalam kes hartanah yang didapatkan semula melalui rundingan, tidak ada lien dalam common law (*Halsbury's Laws of England* 4th Ed, Vol 44(1), para 254). Maka tidak ada perintah caj di dalam common law yang boleh diperoleh. (lihat perenggan 12, 15 & 18)

(4) Untuk perintah caj diperoleh di bawah s 123 Akta Profesion Undang-Undang 1976, mahkamah yang boleh mengisytiharkan seseorang peguamcara dan peguambela berhak untuk sesuatu gadaian ke atas hartanah yang relah didapatkan semula atau dikekalkan adalah mahkamah di mana peguamcara dan peguambela tersebut telah diambil bekerja untuk mendakwa atau membela, dan di mana hartanah tersebut telah didapatkan semula atau dikekalkan. Mahkamah Tinggi bukanlah mahkamah tersebut. Pada hakikatnya, tidak ada mahkamah sedemikian kerana hartanah tersebut tidak didapatkan semula di bawah mana-mana penghakiman. (lihat perenggan 20)

(5) Walaupun ia boleh diterima bahawa hartanah tersebut telah didapati semula di bawah prosiding undang-undang, iaitu, atas tindakan perayu mengeluarkan petisyen penggulungan terhadap penghutang responden, Malaysian Marine and Heavy Engineering Sdn Bhd (MMHE), tetapi ia kekal bahawa lien tersebut oleh perayu hanya boleh dikuatkuasakan oleh perintah caj yang tidak diperoleh. (lihat perenggan 20)

(6) Sesuatu perintah pengesahan di bawah s 223Akta adalah satu-satunya pilihan. Tetapi tidak ada permohonan daripada perayu untuk perintah sedemikian. Tanpa perintah pengesahan, pengiriman RM1.4 juta kepada responden pada 19 Ogos 2009 adalah pelupusan hartanah responden selepas permulaan penggulungan terhadap responden pada 29 Jun 2009 dan adalah dengan itu batal. (lihat perenggan 21)]

Notes:

For cases on Lien over 'property or money recovered or preserved', see 9 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 3271–3286

Cases referred to

Ashmark Ltd (in liquidation), Re 2 IR 10 (refd)
Baronglow v Willing & Thomas [2004] SADC 37 (refd)

JOBNAME: No Job Name PAGE: 4 SESS: 1 OUTPUT: Mon Aug 15 12:40:12 2011
//caseml/case/mlj/2011_004_mlj_161

Barratt v Gough-Thomas, [1950] 2 All ER 1048, CA (refd)
Born, In re; Curnock v Born [1900] 2 ChD 433 (refd)
Clayton, In re; Collins v Clayton and Reade [1940] Ch 539 (refd)
Emden v Carte (1881) 19 ChD 311, CA (refd)
Guy v Churchill (1887) 35 ChD 489, CA (refd)
Gray's Inn Construction Co Ltd, Re [1980] 1 All ER 814, CA (refd)
Kimoyama Elektrik (M) Sdn Bhd v Metrobilt Construction Sdn Bhd [1990] 3 MLJ 309, HC (refd)
Lian Keow Sdn Bhd (in liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & ors [1988] 2 MLJ 449, SC (refd)
Meguerditchian v Lightbound and others [1917] 2 KB 298 (refd)
Meter Cabs, Limited, Re [1911] 2 Ch 557 (refd)
Motherwell, Re (1927) 62 DLR 130, SC (refd)
North West Construction Co Pty Ltd (in liquidation) v Marian (1965) WAR 205 (refd)
Salt v Mohammedan and Hindu Endowments Board [1941] MLJ 220, CA (refd)
Saw Ching Ho & Anor v Tan Ah Kui [1970] 1 MLJ 104 (refd)
White Resource Management Ltd v Durish (1997) 154 DLR (4th) 158 (refd)

Legislation referred to

Advocates and Solicitors Ordinance 1947 (repealed) s 89
Companies Act 1965 ss 218, 219(2) 223
Legal Profession Act 1976 s 123
Solicitors Act 1860 [UK]

Zeffree bin Zainudin (Jeffry Azmi) for the appellant.
Prakash Lachimanan (Mathews Hun Kandiah) for the respondent.

Jeffrey Tan JCA (delivering judgment of the court):

[1] This is an appeal by the defendant/appellant, a firm of solicitors, against the orders pronounced in the application by the liquidator of Inai Offshore & Marine Engineering Sdn Bhd (in liquidation) ('Inai') for: (i) a declaration that the sum of RM1,400,000 paid out of or transferred from the account of Inai to the (appellant) was void for contravention of s 223 of the Companies Act 1965; and (ii) an order that the (appellant) do pay the sum of RM1,400,000 to Inai, where the learned judge allowed the liquidator's application to the extent of 'RM971,336 less 22% being a portion of RM1,400,000' (computed to RM757,642.08).

[2] To be more precise, the learned judge declared: (i) that the sum of RM757,642.08 was paid or transferred to the appellant in contravention of s 223 of the Companies Act 1965 but (ii) that the sum of RM642,357.92 was not paid or transferred to the appellant in contravention of the same said

JOBNAME: No Job Name PAGE: 5 SESS: 1 OUTPUT: Mon Aug 15 12:40:12 2011
//caseml/case/mlj/2011_004_mlj_161

section. Thereupon, the learned judge ordered the appellant to pay RM757,642.08 to Inai (see order dated 30 July 2010 at p 13 of the appeal record). Against that order, the appellant appealed. Inai also appealed (W02–2534 of 2010). Both appeals were argued together.

[3] The pertinent facts were as follows. Prior to its involuntary winding up on 1 October 2009, Inai had engaged the appellant to set aside a mareva injunction obtained by a creditor, one TCTL Engineering Sdn Bhd ('TCTL'), against Inai. Inai had also engaged the appellant to defend a winding up petition (Kuala Lumpur D2–28–492 of 2009) and to negotiate with one Malaysian Marine & Heavy Engineering Sdn Bhd ('MMHE') on its claims for payment for works executed by Inai for MMHE. In its negotiations with MMHE, the appellant met with success, but only after the appellant had issued a s 218 of the Companies Act 1965 notice to MMHE, had set aside the Fortuna injunction obtained by MMHE, had successfully defended all appeals by MMHE against the setting aside of the said Fortuna injunction, and had served a winding-up petition on MMHE. Thereafter, the claim of Inai against MMHE was amicably settled out of court (see 72AR). MMHE paid a sum of RM12,000,000 to Inai on 18 August 2009.

[4] Unquestionably, the appellant had rendered legal service to Inai, for which the appellant had issued the following bills. For the legal service involving TCTL, the appellant had issued a bill of RM971,336,000 which was the exact sum (before being reduced by 22%) that the learned judge held that payment thereof to the appellant was in contravention of the said s 223. And for the legal service involving MMHE, the appellant had issued a bill of RM843,768.05.

[5] It was contended that that RM1,400,000 was payment by Inai towards those bills (see 77AR, para 20). That payment was effected on the written instructions of two directors of Inai on 18 August 2009 (see 234AR) to Al-Rajhi Bank who duly debited the account of Inai and credited the sum of RM1,400,000 into the account of the appellant on 19 August 2009 (see 235AR).

[6] There was no dispute that the sum of RM1,400,000 was so remitted to the appellant on 19 August 2009. There was also no dispute to the following facts. Inai was ordered to be wound up by the High Court at Kuala Lumpur on 1 October 2009 pursuant to a winding up petition (D1–28–482 of 2009) presented by a creditor, one Mintmark Corp Sdn Bhd, on 29 June 2009. That petition had been served (on 12 August 2009) as well as advertised (on 13 August 2009, 14 August 2009, 19 August 2009, 20 August 2009 and 27 August 2009. The payment or remittance of that sum of RM1,400,000 was

JOBNAME: No Job Name PAGE: 6 SESS: 1 OUTPUT: Mon Aug 15 12:40:12 2011
//caseml/case/mlj/2011_004_mlj_161

effected after presentation of that winding up petition by Mintmark (D1–28–482 of 2009). The legal service of the appellant was not rendered to Inai at the behest of the liquidator.

[7] Given that payment was effected after presentation of the winding up petition (D1–28–482 of 2009), it was the stand of the liquidator of Inai that that payment was in contravention of s 223 of the Companies Act 1965, which reads:

> Any disposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding up by the Court shall unless the Court otherwise orders be void.

[8] On the other hand, it was the stand of the appellant that the appellant had a lien over the sums recovered from MMHE.

[9] Mr Praskash Lachimanan for the liquidator agreed that at common law a solicitor has a lien over monies recovered under a judgment obtained by his exertions. But notwithstanding whatever lien, Mr Praskash contended that the bills of the appellant could only be paid with a charging order obtained under s 123 of the Legal Profession Act 1976.

[10] Diverse authorities were cited both here and below on the law relating to the lien of a solicitor. Suffice it to say that it was the finding of the learned judge that the appellant had a lien over the sums recovered from MMHE, to the extent of the costs of the proceedings that concerned MMHE but not TCTL (see 38AR). With that latter finding, the learned judge then held that 'it was not necessary for (him) to order validation of the remittance under s 223, (see 40AR). Those findings, as well as the reasons for them, were thus set out in following passages of the judgment of the learned judge:

> It will be seen that the terms of s 123 are permissive and not mandatory in nature. The court 'may' declare the solicitor entitled to the charge in respect of property recovered or preserved. Logically, if the property recovered or preserved has been willingly utilised by the client to pay the solicitor's costs, where is the necessity to still apply to court to obtain a charge over the property to ensure the payment of the very same costs? In a sense, where the solicitors legal costs have been paid out of the property or funds recovered or preserved for the benefit of his client as the fruits of the litigation, the common law lien is perfected. The lien is created when the solicitor performs the litigation work and renders a bill; the lien is perfected when the property or fund is received by or on behalf of the client; the lien is enforced where a charging order is obtained. This is the reasoning that is found in *Baronglow Pty Ltd v Willing (Thomas Intervener)* … It should also not make any difference into whose hands the property or fund is initially placed. As stated in another Australian case, namely *North West Construction Co Pty Limited (in liquidation) v Marian*

JOBNAME: No Job Name PAGE: 7 SESS: 1 OUTPUT: Mon Aug 15 12:40:12 2011
//caseml/case/mlj/2011_004_mlj_161

(1963) WAR 205, the solicitors' common law lien over property recovered or preserved, while not a true possessory lien, nevertheless attaches to the property 'regardless of possession'. This case, as well as in *Re Meter Cabs Limited* [1911] 2 Ch 557; *Guy v Churchill* (1887)35 ChD 489, explains the equitable basis for accepting the common law lien … (see 35–36AR).

…

The principle and logic is plain. By the exertions of his effort for his client, the solicitor has added value to the client, and therefore it is only fair that he be paid as a secured creditor for this effort. In the context of winding up, when the solicitor is paid on this basis, they cannot surely be said to be stealing a march on the unsecured creditors, for the simple reason that he has added value to the company. In any event, there would be little logic if the law allows a solicitor who act for the liquidator to be paid his fees even in the course of winding up, and yet deny the payment of fees to a solicitor who has recovered and preserved property for the client but paid after the commencement of winding up. On the facts of this case, the (appellant) has added RM12,000,000 in value to the assets of (Inai) … (see 37AR).

…

Since the lien is a particular lien, as earlier noted, it cannot therefore be available for the general balance of account between the solicitor and the client but extends only to the costs of the proceedings in which the property is recovered. On the facts of this case, the recovery is in respect of the proceedings against MMHE and the monies were recovered from MMHE. On the facts and on the law therefore, this lien can only attach against the monies constituting the costs of the particular proceedings, and that will be RM843,768.95 less a 22% reduction agreed by the (appellant) (see 39AR).

[11] Certainly, at common law a solicitor has a right to retain a client's document and property pending payment of the solicitor's bill. A 1950 English case, *Barratt v Gough-Thomas,* cited at [1950] 2 All ER 1048, and followed in Canada (in *White Resource Management Limited v Durish* (1997) 154 DLR (4th) 158, used these words: 'The nature of a solicitor's general retaining lien has more than once been authoritatively stated. It is a right at common law depending, it has been said, on implied agreement. It has not the character of an encumbrance or equitable charge. It is merely passive and possessory, that is to say, the solicitor has no right of actively enforcing his demand. It confers on him merely the right to withhold possession of the documents or other personal property of his client or former client.' From *Re Motherwell* (1927) 62 DLR 130 (Ontario Supreme Court): 'The right of a solicitor to a lien on the documents of his client which come to his hands in the course of his employment is a well recognised right, and one which … is for the benefit of clients as it often enables or induces solicitors to carry on proceedings for the client which they might otherwise be unwilling to do; but it is a right which is subject to certain qualifications.' 'The right of a solicitor in documents in his possession cannot exceed that of his client, and if third persons have a joint interest in them, or for any other cause have a right to call on the client to

JOBNAME: No Job Name PAGE: 8 SESS: 1 OUTPUT: Mon Aug 15 12:40:12 2011
//caseml/case/mlj/2011_004_mlj_161

produce them, the lien of the solicitor cannot debar them of that right. 'The solicitor's lien creates no charge upon the property, if any, to which the documents relate, it is not like an equitable mortgage by deposit; the lien is merely a passive right of retainer, and cannot be actively enforced as in the case of other liens. So long as it exists it has been held that the solicitor can withhold the documents from inspection by his client, or anyone claiming under him; although it has been held that the client can by subpoena duces tecum served on the solicitor compel him as a witness to produce them in evidence in support of the client's case' (www.duhaime.org/LegalDictionary).

[12] We adopt the commentary in *Halsbury's Laws of England* (4th Ed), Vol 44(1), paras 244 and 254) as a correct proposition of the common law on the lien of a solicitor:

> 244 Solicitors rights
>
> At common law a solicitor has two rights which are termed liens. The first is a right to retain property already in his possession until he is paid costs due to him in his professional capacity and the second is the right to ask the court to direct the personal property recovered under a judgment obtain by his exertions stand as security for his costs of such recovery. In addition, a solicitor has by statute a right to apply to the court for a charging order on property recovered or preserved through his instrumentality in respect of his taxed costs of the suit, matter of proceeding prosecuted or defended by him.
>
> 254 Particular Lien on property recovered
>
> Apart from statute a solicitor has at common law a lien which may be actively enforced over a fund or the proceeds of a judgment recovered for the client in the course of litigation or arbitration by the solicitor's exertions, but not over the fruits of negotiation without litigation. The existence of the particular lien does not depend on the proprietary or possessory relationship of the solicitor to the property. This lien, although always referred to as a 'lien', is more accurately described as a mere right to ask for the court's intervention for the solicitor's protection when, having obtained a judgment for his client, he finds that there is a probability of the client depriving him of his costs. It is a right to ask the court to charge the property in favour of the solicitor and until that is done the solicitor has no right to the money. The lien is a particular lien. It is not therefore available for the general balance of account between the solicitor and the client but extends only to the costs of the proceedings in which the property is recovered, including the costs of protecting the solicitor's right to those costs, of establishing the solicitor's retainer if it is disputed and of matters incidental to the recovery. The lien may be asserted by the solicitor although his right to recover the costs may be barred by lapse of time.

[13] Thus, at common law the appellant had the right to retain the property of Inai pending payment of its bills. But that property (RM12,000,000) was paid directly to Inai (see 236AR). Since it was never in its possession, the

JOBNAME: No Job Name PAGE: 9 SESS: 1 OUTPUT: Mon Aug 15 12:40:12 2011
//caseml/case/mlj/2011_004_mlj_161

appellant could not have retained that RM12,000,000 pending payment of its bills. A solicitor has two rights. 'The first is a right to retain property already in his possession until he is paid costs due to him in his professional capacity and the second is the right to ask the court to direct the personal property recovered under a judgment obtain by his exertions (to) stand as security for his costs of such recovery' (see *Halsbury's,* para 244). But on the facts, the lien of the appellant, if any, could not be under the first category, that is, the right to retain the property of Inai pending payment of its bills.

[14] Without possession of the property, the lien of the appellant could only be under the second category, in which case, the appellant could 'ask the court to direct the property recovered under a judgment obtained by his exertions (to) stand as security for his costs of such recovery (*Halsbury's,* para 244). 'This common law has not been abrogated by the statute ((UK) Solicitors Act 1860) or affected by the winding-up and all I am really asked to do is to give the statutory charge in aid of the already existing common law lien which is prior to any right of the official receiver or liquidator' (*In re Born; Curnock v Born* [1900] 2 Ch 433 at p 435, per Farwell J). All except that the property (RM12,000,000) was not recovered under any judgment. The property was recovered by negotiation.

[15] In the case of property recovered by negotiation, there is no lien (*Halsbury*'s, para 254). That principle was laid down in *Meguerditchian v Lightbound and others* [1917] 2 KB 298, where documents were recovered by negotiation, and where it was held (Swinfen Eady, Bankes LJJ and Bray J) that the property over which the lien is sought must have been recovered or preserved as the result of some sort of legal proceedings and not merely of negotiations between parties. Swinfen Eady LJ held that a charging order which can be obtained under the (UK) Solicitors Act 1860 on property recovered or preserved only referred to litigation, while Bankes LJ disagreed that a solicitor's lien can be applied to the facts of the case.

[16] *Meguerditchian v Lightbound* was cited in *Salt v Mohammedan and Hindu Endowments Board and others* [1941] 1 MLJ 220, where, on the issue as to whether a solicitor has a lien for his costs over trust funds, it was held (McElwaine CJ (SS), Terrell Ag CJ (FMS) and Aitken Ag JA) that the money was paid to the solicitor for a specific purpose and that the solicitor could have no lien upon it apart from what might arise from carrying on that purpose. Aitken Ag JA unequivocally agreed that a solicitor does not acquire any lien on the fruits of a mere negotiation without litigation:

> Before I close I should perhaps, mention the case of *Meguerdtchian v Lightbound and others* [1917] 2 KB 298, in which the Court of Appeal in England laid it down that a solicitor does not acquire any lien on the fruits of a mere negotiation without

JOBNAME: No Job Name PAGE: 10 SESS: 1 OUTPUT: Mon Aug 15 12:40:12 2011
//caseml/case/mlj/2011_004_mlj_161

litigation. I confess that this case came somewhat as a surprise to me, but the principle underlying that decision appears to be embodied in the following passage in the judgment of Bankes LJ at p 308:

> On the question of law it seems to me quite impossible to contend successfully that the rule of law which has been hitherto applied to the solicitor's lien in respect of property recovered can be applied to a case such as this. Mr Leslie Scott has claimed that the underlying principle should be applied to it. With great respect to him, I can see a very good reason why the principle should be applied in cases where there are proceedings, whether they consist of an action or arbitration, but I can see very good reasons why they should not be applied when the solicitors are left free to take whatever course they choose in order to secure a compromise.
>
> At any rate it seems to offer yet another reason why this appeal should be dismissed, and with costs.

[17] Indeed, it ought to be noted that property was recovered or preserved under a judgment/order in the following authorities cited by the learned judge. In *Baronglow v Willing & Thomas* [2004] SADC 37, there was a consent judgment. In *Guy v Churchill* (1887) 35 ChD 489, there was also a judgment. And in *North West Construction Co Pty Limited (in liquidation) v Marian* (1965) WAR 205, the court had sanctioned the compromise. Admittedly, in *Re Meter Cabs, Limited* [1911] 2 Ch 557, there was no judgment. But the arbitration between the parties was settled with the consent of the liquidators of the parties.

[18] The said property (RM12,000,000) was recovered by negotiation. Under common law, the appellant could not obtain a charging order. But alas, even under statute law, the appellant could obtain a charging order, certainly not from the court below.

[19] Section 123 of the Legal Profession Act 1976 (which is identical to s 89 of the repealed Advocates and Solicitors Ordinance 1947) reads:

> Any court in which an advocate and solicitor has been employed to prosecute or defend any suit, matter or proceeding may at any time declare the advocate and solicitor entitled to a charge on the property recovered or preserved in such suit, matter or proceeding for such advocate and solicitor's taxed costs in reference to that suit, matter or proceeding, and may make such orders for the taxation of the costs and for raising money to pay, or for paying, the costs out of the property as it thinks fair and reasonable, and all conveyance and acts done to defeat, or operating to defeat, that charge shall, except in the case of a conveyance to a bona fide purchaser for value Without notice, be void as against the advocate and solicitor:
>
> Provided that no order shall be made if the right to recover the costs is barred by the Limitation Act 1953.

JOBNAME: No Job Name PAGE: 11 SESS: 1 OUTPUT: Mon Aug 15 12:40:12 2011
//caseml/case/mlj/2011_004_mlj_161

[20] In effect, s 123 of the LPA stipulates that the court to declare an advocate and solicitor entitled to a charge on the property recovered or preserved is the court in which that advocate and solicitor has been employed to prosecute or defend, and in which that property has been recovered or preserved. The court below was not that court. As a matter of fact, there was no such court, as the property (RM12,000,000) was not recovered under any judgment. It comes down to this. The lien of the appellant, if any, be it under common law or statute, could only be enforced by a charging order (see *Saw Ching Ho & Anor v Tan Ah Kui* [1970] 1 MLJ 104, where Sharma J held that with a charging order under s 89 of the Advocates and Solicitors Ordinance 1947, 'the costs have to be taxed', and *Emden v Carte* (1881) 19 ChD 311, where it was held by Fry J that it is the duty of the judge, when declaring a solicitor entitled to a charge upon the property recovered or preserved in an action, to limit the order to costs properly incurred in recovering or preserving the property; but see *In re Clayton; Collins v Clayton and Reade* [1940] 1 Ch 539, where it was held by Moron J that the general principle is to give a solicitor a reward and therefore a wider charge). But the instant property was not recovered under a judgment, and a charging order was consequently out of the question, be it under common law or statute. Even if it could be accepted that the property was recovered under legal proceedings, that is, on account of the winding-up petition against MMHE, yet it remained that the lien of the appellant could only be enforced by a charging order which was not obtained.

[21] On the facts of the present case, a validation order under s 223 was the only doable option. But there was no application from the appellant for such an order. Winding up had commenced against Inai on 29 June 2009, that is, at the time of the presentation of the petition of winding up (see s 219(2) of the Companies Act 1965). Without an order of validation, that remittance of RM1,400,000 to the appellant on 19 August 2009, which was clearly a disposition of the property of Inai after commencement of winding up, was void (see *Lian Keow Sdn Bhd (in liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 449; *Kimoyama Elektrik (M) Sdn Bhd v Metrobilt Construction Sdn Bhd* [1990] 3 MLJ 309; *Re Gray's Inn Construction Co Ltd* [1980] 1 All ER 814); and *In re Ashmark Limited (in liquidation)* 2 IR 10, amongst a host of authorities on s 223 or equipollent provision). 'The disposition rendered void is void at the time it takes place' (see McPherson, *The Law of Company Liquidation*, (4th Ed) at p 222).

[22] Without a charging order or an order of validation, the entire remittance to the appellant was void. The entire remittance must be returned to Inai.

[23] For the above reasons, we unanimously dismiss Appeal No W-02–2804

JOBNAME: No Job Name PAGE: 12 SESS: 1 OUTPUT: Mon Aug 15 12:40:12 2011
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of 2010 and allow Appeal No W-02–2536 of 2010, with costs of both appeals being awarded to Inai. We unanimously order the appellant to return the entire remittance to Inai.

Appellant's appeal dismissed and the respondent liquidator's appeal allowed with costs of both appeals to the respondent.

Reported by Ashok Kumar